BRB No. 13-0140 BLA

OAKLEY T. BLEVINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 12/20/2013
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5621) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on March 2, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with at least 41 years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contain in 20 C.F.R. Parts 718 and 725.[1] The administrative law judge found that the evidence established the existence of clinical pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4) and 718.203(b) (2013). However, the administrative law judge found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013).[3] The administrative law judge also found that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (b), (c) (2013), thereby failing to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2013). Further, the administrative law judge found that claimant was not entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] Accordingly, the administrative law judge denied benefits.

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[1] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[2] The administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013).

[3] The administrative law judge determined that the issue of disability causation pursuant to 20 C.F.R. §718.204(c) (2013) was moot because claimant did not prove total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013).

[4] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least 15 years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and (c) (2013). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal. Claimant filed a brief in reply to employer's response brief, reiterating his prior contentions.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 (2013). Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 (2013), there is an irrebuttable presumption of total disability due to pneumoconiosis if claimant suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as

[5] The administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (2), (4), 718.203(b) (2013), and his findings that the evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2013), the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) (2013), and total respiratory disability at 20 C.F.R. §718.204(b) (2013) are not challenged on appeal. We, therefore, affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304 (2013). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis,[7] that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304 (2013). The administrative law judge must weigh together all the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

The administrative law judge found that the x-ray evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) (2013), because "none the physicians' x-ray readings found complicated pneumoconiosis." Decision and Order at 26. The administrative law judge also found that the biopsy evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) (2013), as the pathologists who opined that claimant has complicated pneumoconiosis did not render equivalency determinations and their opinions were speculative. Further, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) (2013), because "the CT and PET [scan] evidence cannot be considered" and the only medical opinion that could establish that claimant has complicated pneumoconiosis is "poorly" documented and "poorly" reasoned. *Id*. at 28, 29. Based on his weighing of all the evidence together, the administrative law judge found that the preponderance of the

[7] The condition described by these criteria is referred to as "complicated pneumoconiosis," although that term does not appear in the statute or the regulations. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 11 (1976); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242-43 (4th Cir.1999).

evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 (2013).

Initially, we will address claimant's assertion that the administrative law judge erred in finding that the biopsy evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) (2013). Specifically, claimant argues that the administrative law judge erred in discrediting the pathology opinions of Drs. Abraham and Kahn. Claimant maintains that the administrative law judge mischaracterized the pathology opinions of Drs. Abraham and Kahn as "speculative." Claimant's Brief at 10. Claimant also argues that the administrative law judge erred in failing to consider the objective basis for the opinions of Drs. Abraham and Kahn. We disagree.

It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy claimant's burden of proof. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In this case, the administrative law judge considered the pathology reports of Drs. Olivier, Chang, Oesterling, Caffrey, Abraham and Kahn.[8] The administrative law judge noted that Dr. Olivier did not

[8] In his report, Dr. Olivier noted that he performed a flexible bronchoscopy wedge resection of the right upper lobe mass. Claimant's Exhibit 4. Dr. Olivier's post-operative diagnosis was unspecified lung mass. *Id*.

In his report, Dr. Chang reviewed the right apical segment of the upper lobe of the lung biopsy and the right lobe of the lung mass resection, and found severe pneumoconiosis in both parts without tumor. Claimant's Exhibit 5.

Dr. Oesterling opined that "there are no lesions noted within these [histologic] sections that approached the 1.0 cm size necessary for a legal and radiographic diagnosis of complicated coal workers' pneumoconiosis." Director's Exhibit 28.

Dr. Caffrey opined that he did not see the necessary microscopic findings to make a diagnosis of complicated coal workers' pneumoconiosis. Employer's Exhibit 4.

In his pathology report, Dr. Abraham identified a lesion "that extends from one side to another of the microscopic section (indicating it was larger than the amount actually represented on the slide)." Director's Exhibit 20. Dr. Abraham found that "[t]he amount on the slide is 1.0 cm, so the lesion was more than 1.0 cm, obviously." *Id*. In summary, Dr. Abraham opined that "the

mention complicated pneumoconiosis or progressive massive fibrosis. Similarly, the administrative law judge noted that Dr. Chang did not diagnose complicated pneumoconiosis or progressive massive fibrosis. The administrative law judge also noted that Dr. Oesterling found that "the largest area of change was on slide C, and it measured approximately 6 mm at its greatest dimension." Decision and Order at 27-28. Further, in noting that Dr. Caffrey made a similar finding, the administrative law judge stated that "[Dr. Caffrey] did not find a lesion to be greater than 1.0 cm." *Id*. at 28. With regard to the opinions of Drs. Abraham and Kahn, the administrative law judge determined that "[b]oth of these pathologists, however, noted that the lesion on the slide was only 1.0 cm, but speculated that the mass was larger than 1.0 cm as they believed that the entire lesion was not represented on the slide."[9] *Id*. at 26. In addition, the administrative law judge stated that "neither pathologist rendered an equivalency determination." *Id*. at 27. The administrative law judge therefore found that the preponderance of the biopsy evidence did not establish the presence of complicated pneumoconiosis.

Contrary to claimant's assertion, the administrative law judge reasonably found that the pathology opinions of Drs. Abraham and Kahn were speculative. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Moreover, the administrative law judge reasonably found that no evidentiary basis existed for him to make an equivalency determination between the biopsy findings and x-ray findings. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the pathology opinions of Drs. Abraham and Kahn.[10] The Board cannot substitute its conclusions for the rational

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radiographic studies and pathology studies confirm lesions related to coal mine work which are greater than 1.0 cm in maximum diameter" and that "[t]his seems to fulfill the criteria for complicated [coal workers' pneumoconiosis]." *Id*.

In his pathology report, Dr. Kahn identified coal and anthracosilicotic nodules. Dr. Kahn found that "[w]hile the largest of these measures 1.0 cm in maximal dimension, that entire lesion is not represented in the section, in that is (sic) has been cut off on two opposing slides." Claimant's Exhibit 9. Dr. Kahn opined that, "[i]n vivo, the lesion was larger than 1.0 cm." *Id*.

[9] The administrative law judge determined that "any suggestion that the mass is greater than 1.0 cm is speculative at best." Decision and Order at 27.

[10] Claimant asserts that the administrative law judge erred in failing to "address the fact that Dr. Abraham and Dr. Kahn have superior qualifications pertaining to the diagnosis of occupational lung disease and coal workers'

inferences made by the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the biopsy evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) (2013).

Next, we address claimant's assertion that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) (2013). After noting that none of the x-rays in the treatment records contained a diagnosis of complicated pneumoconiosis, the administrative law judge determined that "[i]t is not established that a CT scan or PET scan is medically acceptable and relevant to establishing or refuting a claim." Decision and Order at 28. Hence, the administrative law judge found that CT and PET scan evidence cannot be considered. Further, in considering the reports of Drs. Rasmussen, Zaldivar, Rosenberg and Patel,[11] the administrative law judge determined that "[t]he only physician who prepared a medical report that diagnosed [c]laimant with complicated pneumoconiosis was Dr. Patel, the miner's treating physician." *Id*. at 29. Because the administrative law judge determined that Dr. Patel's opinion was "poorly" documented and "poorly" reasoned, he found that the medical opinion evidence did not establish the presence of complicated pneumoconiosis. Moreover, based on his weighing of all the medical evidence together, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis at Section 718.304(c) (2013).

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pneumoconiosis." Claimant's Brief at 12. Claimant also asserts that the administrative law judge erred in crediting Dr. Oesterling's opinion that there were no lesions that approached the size of 1.0 cm, which is necessary to diagnose complicated pneumoconiosis. Director's Exhibit 28. As discussed, *supra*, the administrative law judge permissibly discredited the pathology opinions of Drs. Abraham and Kahn because they were speculative, *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and because the doctors did not render equivalency determinations, *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Thus, we need not address claimant's assertions with regard to the opinions of Drs. Abraham, Kahn and Oesterling.

[11] Dr. Patel, who has treated claimant since 1992, found biopsy changes consistent with complicated pneumoconiosis. Claimant's Exhibit 6.

Claimant asserts that the administrative law judge erred in failing to consider the CT and PET scan evidence. Specifically, claimant asserts that "[the administrative law judge's] determination…is conclusory and it fails to address the fact that CT and PET scans were an integral part of how the treating physicians evaluated [claimant] and determined that the mass or nodule in his right upper lung was complicated pneumoconiosis and not cancer." Claimant's Brief at 8. Claimant also asserts that the administrative law judge improperly substituted his own opinion for that of the medical experts. Claimant's Reply Brief at 3. We disagree.

With regard to CT scan evidence, 20 C.F.R. §718.107 (2013) provides, in pertinent part, that "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis . . . may be submitted in connection with a claim and shall be given appropriate consideration." 20 C.F.R. §718.107(a) (2013). The Board has consistently held that, pursuant to 20 C.F.R. §718.107(b) (2013), an administrative law judge must determine, on a case-by-case basis, whether the proponent of the "other medical evidence" has established that the test or procedure is "medically acceptable and relevant to entitlement." *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc). In this case, the administrative law judge reasonably found that the record did not show that the CT scan or PET scan evidence is medically acceptable and relevant to a determination of whether claimant suffers from complicated pneumoconiosis. *See* 20 C.F.R. §718.107(b) (2013); *Webber*, 23 BLR at 1-133; Decision and Order at 28. Consequently, the administrative law judge permissibly declined to consider the CT and PET scan evidence.[12]

[12] Claimant asserts that Dr. Smith's opinion regarding a June 18, 2009 CT scan is sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) (2013) because it is based on the doctor's equivalency determination. Specifically, claimant avers that "Dr. Smith…reviewed the CT scan along with the [Department of Labor] x-ray and explained that '[t]he larger opacities which are clearly seen on the CT [scan] are not appreciated on the plain film.' DX 31." Claimant's Brief at 13. Claimant further asserts that "Dr. Smith also said that if viewed on a conventional chest x-ray, the large opacities 'would represent conglomerate occupational pneumoconiosis, Category A.' *Id*." Claimant's Brief at 13-14. Because the administrative law judge permissibly declined to consider the CT and PET scan evidence, *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc), claimant's arguments are unavailing.

Claimant also asserts that the administrative law judge erred in discounting Dr. Patel's opinion. Specifically, claimant argues that the administrative law judge erred in failing to consider the objective basis for Dr. Patel's opinion. Contrary to claimant's assertion, the administrative law judge permissibly discounted Dr. Patel's opinion because it is "poorly" documented and "poorly" reasoned.[13] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Patel's opinion.

Claimant further asserts that the administrative law judge erred in failing to consider the objective basis for Dr. Boustani's opinion. In a medical treatment note dated September 14, 2010, Dr. Boustani diagnosed "[claimant] with complicated pneumoconiosis as evidenced by his open lung biopsy."[14] Claimant's Exhibit 1. Although the administrative law judge summarized Dr. Boustani's medical treatment note, he did not consider the doctor's opinion with regard to his weighing of the evidence at 20 C.F.R. §718.304(c) (2013). Nevertheless, because Dr. Boustani did not render an equivalency determination in his medical treatment note, *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62, we hold that any error by the administrative law judge in failing to consider Dr. Boustani's opinion at 20 C.F.R. §718.304(c) (2013) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) (2013).

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[13] The administrative law judge determined that "Dr. Patel failed to specifically identify the evidence he reviewed when preparing his report[,] making it poorly documented." Decision and Order at 29. Further, in finding that Dr. Patel's opinion was "poorly" reasoned, the administrative law judge determined that "Dr. Patel's medical report is essentially a summary of evidence with no conclusions or diagnoses." *Id*. In addition, the administrative law judge found that Dr. Patel's diagnosis of complicated pneumoconiosis was solely based on a single CT scan. The administrative law judge noted that Dr. Patel failed to consider the negative x-ray evidence or the pathological and medical reports that were prepared in anticipation of litigation, "except with the possibility of Dr. Abraham's report, which predates Dr. Patel's." *Id*. at 29 n.50.

[14] Dr. Boustani treated claimant from July 2009 through October 2010 for pulmonary problems related to shortness of breath and chest pain. Claimant's Exhibit 1.

Furthermore, because the administrative law judge properly found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c) (2013), we affirm his finding that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 (2013).

Moreover, because the administrative law judge properly found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b) (2013), we affirm the administrative law judge's finding that claimant is not entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

In light of our affirmance of the administrative law judge's findings that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 (2013), that claimant is not entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b) (2013), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge